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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and industrial relations executives, representing nearly 23,000 professionals in business, government, and education dedicated to the furtherance of personnel and industrial relations management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

ASPA is particularly concerned that the enforcement and interpretation of laws and regulations gov-

erning employment be mutually compatible, and that the diverse agencies of government charged with the regulation of the workplace be cognizant of the need to enforce the laws entrusted to them in a rational and consistent manner. ASPA believes that this case presents a classic case of regulatory "tunnel vision," in which the NLRB chose to fashion a remedy for an alleged violation of the NLRA in a manner which would create significant barriers to compliance with Title VII of the Civil Rights Act of 1964, as amended. Further, the cavalier treatment given to the serious effort of the psychological profession to effect a responsible code of practice, prompted in large part by the development of Title VII law, is cause for great concern.

ASPA believes that this case provides the appropriate vehicle for the Supreme Court to articulate an appropriate balance between different laws which impact heavily on the workplace, as well as to establish guidelines for agencies and courts in considering the impact of their decisions on professional self-regulation.

SUMMARY OF ARGUMENT

This case raises in classical form a conflict between two of the major statutes governing employment in the workplace, the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, as amended, and affects employers and employees nationwide. While the case at bar arose under the National Labor Relations Act, the NLRB chose to fashion a remedy for a purported violation of that Act which would render employers' compliance with the mandates of Title VII impossible. The tension thus created between these two equally valid statutory purposes places any

personnel administrator faced with a similar situation in the impossible position of being forced to decide which law will be violated.

While it may be appropriate for an administrative agency to decide issues before it solely on the basis of the single statute it was created to enforce, it is not appropriate for that agency to remedy a violation of its statute in a way that does violence to the equally important mandate of another statute. This is of particular importance when the remedy ordered is not compelled by any statute. When the agency nevertheless decides in this manner, it is the responsibility of the judicial branch to resolve conflicts between statutes and fashion appropriate relief for one statutory violation in such a manner so as to preserve the integrity of the other statute. The court below did not discharge this responsibility. It chose merely to affirm the NLRB's interpretation of the National Labor Relations Act. By so deciding, the court below made compliance with the compelling mandate of Title VII impossible. In such a situation, the Supreme Court must set the proper balance between the two statutes. See *Emporium Capwell* v. *WACO*, 420 U.S. 150 (1975).

Further, the National Labor Relations Board and the court below dismissed, as irrelevant, professional standards developed by the American Psychological Association for personnel test administration and use which have received repeated endorsement by this court and the agencies charged with the enforcement of the various anti-discrimination laws. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); 29 C.F.R. § 1607, 41 C.F.R. Part 60-3. These standards were developed in part as a response to the mandate of Title VII that criteria used in making employment decisions be job-

related so as to remove artificial and discriminatory barriers to employment opportunities, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and represent a concerted effort by the psychological profession to develop standards for effective self-regulation. The policy implemented in the decision below would render these efforts at self-regulation a nullity, and negate a decade of progress in raising the standards of personnel administration.

This case thus raises a clear instance of statutory conflict and public policy concern which this Court should resolve.

ARGUMENT

I. The Decision In The Court Below Will Prevent Employers From Using Tests Or Other Objective Employee Selection Devices. By Rendering Validation Of Selection Procedures Impossible.

This Court has firmly established the purpose of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*, to be the achievement of "equality of employment opportunities" and the removal of "barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 430. In response to this mandate, the whole spectrum of personnel activities has come under close scrutiny by the equal employment enforcement agencies and the courts. In particular, the use of tests in employment matters has been a matter of keen interest to this Court. The proper use of tests for employment purposes is clearly favored. Title VII specifically provides that the use of "professionally developed ability tests" is a sanctioned activity as long as the tests are not designed, intended or used to discriminate. 42 U.S.C. § 2000e-2(h). The EEOC states as a matter of policy that "properly validated and standardized em-

ployee selection procedures can *significantly contribute* to the implementation of non-discriminatory personnel policies, as required by Title VII." 29 C.F.R. § 1607.1 (a) (emphasis added). And this Court has given detailed review to the use of tests with respect to their impact on the employment opportunities of the various protected groups. The teaching of this Court in cases arising under Title VII is that the use of tests in making employment decisions is a preferred activity, provided that the tests are validated as job-related in accordance with accepted professional standards. *Albemarle Paper Co.* v. *Moody, supra.* The requirement that tests be validated as job-related applies under constitutional review as well. *Washington* v. *Davis,* 426 U.S. 279 (1976).

The professional standards on which this Court, the Congress and the enforcement agencies rely have been developed under the sponsorship of the American Psychological Asociation ("APA") over a period of years and represent a concerted effort to ensure that tests are properly used and test takers are protected. In accord with the mandates of this Court, personnel administrators have come to rely upon these standards as one method of ensuring that their employment decisions are in compliance with Title VII.

Standards promulgated by the APA, and extensive professional research in this area, clearly establish that test security is a prerequisite to the proper validation of an employee selection device. Standard 15 of the APA as published provides:

> "15. The test user shares with the test developer or distributor a responsibility for maintaining test security.

Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures could destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test."

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATION & PSYCHOLOGICAL TESTS 67 (1974) (hereinafter "APA STANDARDS").

Standard J2 of the APA Standards states:

"J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.

Comment: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject or to hire or to reject, or to certify or not to certify, must have the interpretation. One useful (and unanswered) question is whether such a person who lacks the training necesary for the interpretation of scores should be given that training or should be given only the interpretations of scores." *Id.* at 68.

Supplementing the APA Standards, the Division of Industrial-Organizational Psychology of the APA

(Division 14) has published a set of principles described as the "official statement of the Division concerning procedures for validation research, personnel selection, and promotion."

That Division's Principle C-13 provides:

"The psychologist or other test user is responsible for maintaining test security. This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests."

APA DIVISION OF INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGY, PRINCIPLES FOR VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (hereinafter "DIVISION 14 PRINCIPLES") 15 (1975).

Under these judicially recognized professional standards, tests disclosed to laymen in the manner ordered by the NLRB and the court below could not be validated as job-related under the requirements of equal opportunity law.

This Court has clearly enunciated a rule that the statutory mandates of the National Labor Relations Act cannot be disregarded even by employees who are protesting unlawful racial discrimination. *Emporium Capwell* v. *WACO, supra.* And lower courts which have been faced with the need to reconcile the two statutes have devised approaches that are compatible with both the NLRA and Title VII. *Meyers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir. 1977). The failure of the NLRB and the court below to follow this practice disregards national policy requiring the use of job-related criteria in the equal employment context, and should be reviewed by this Court.

II. The Decision Of The Court Below To Release Tests, Answer Sheets, Unanalyzed Test Scores And The Identity Of Test Takers Shows A Clear Disregard Of The Rights Of Test Takers And Of Professional Ethical Standards.

The court below noted that the Detroit Edison employees who took the test in question did so under a pledge of confidentiality given by the Detroit Edison psychologists. *NLRB* v. *Detroit Edison Co.*, 560 F.2d 722 (6th Cir. 1977). Such a pledge of confidentiality is the standard and preferred practice in the field of employment testing.[1] The ethical standards of psychologists, promulgated by the APA emphasize strongly the duty of psychologists to keep test data confidential in order to protect the privacy of the test takers:

> "PRINCIPLE 5. CONFIDENTIALITY. Safeguarding information about an individual that has been obtained by the psychologist in the course of his teaching, practice, or investigation is a primary obligation of the psychologist. Such information is not communicated to others unless certain important conditions are not met.
>
> (a). Information received in confidence is revealed only after most careful deliberation and

[1] One of the leading authorities in the field of employment testing —a former President of the APA—describes the obligation of psychologists in the following manner:

> "When tests are administered in an institutional context, as in a school system, court, or employment setting, the individual should be informed at the time of testing regarding the purpose of the test, how the results will be used, and their availability to institutional personnel who have a legitimate need for them. Under these conditions, no further permission is required at the time results are made available within the institution. A different situation exists when test results are requested by outsiders, as when a prospective employer or a college requests test results from a school system. In these instances, individual consent for release of the data is required." A. ANASTASI, PSYCHOLOGICAL TESTING 53-54 (4th ed. 1976).

> when there is clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities.
>
> (b). Information obtained in clinical or consulting relationships, or evaluative data concerning children, students, employees, and others are discussed only for professional purposes and only with persons clearly concerned with the case. Written and oral reports should present only data germane to the purposes of the evaluation and every effort should be made to avoid undue invasion of privacy."
>
> AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL STANDARDS OF PSYCHOLOGISTS 4 (1977 Revision).

The disclosure of the identity of the persons who took the Detroit Edison test and their test scores thus not only results in the destruction of the usefulness of the test and prevents its validation (see discussion I, *supra*), but also violates the professional standards designed to protect the integrity and privacy of the test taker. Contrast the action of the Second Circuit in preserving the confidentiality of a test in order to protect future test takers from unfair competition. *Kirkland* v. *Department of Correctional Services,* 520 F.2d 420 (2nd. Cir. 1975). Here, the potential for abuse goes far beyond that faced by the *Kirkland* court, for the employees who took the test under a pledge of confidentiality will have their unanalyzed test scores released to union stewards and officials. The court below summarily dismissed this concern on the theory that nothing can stand as a barrier to the right of a collective bargaining representative to get any information it wishes about employees in order to carry out its duties. But such breach of the pledge of confidentiality given to innocent test takers is not compelled

by any statute or legislative scheme to promote collective bargaining, and cuts sharply against the compelling public policy of protecting an individual's privacy. It finds no support in the concept of exclusivity of union representation. This Court has established a requirement that every regulatory agency "act with a discriminating awareness of the consequences of its action." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 174 (1962). The NLRB and the court below neglected this obligation.

In these circumstances, the Court should grant the petition for a writ of certiorari in order fully to address the complex issues ignored by the NLRB and the court below.

CONCLUSION

For these reasons, *Amicus* American Society for Personnel Administration submits that a *writ of certiorari* should issue so that this Court will be able to review thoroughly the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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